Summaries of Published Opinions

January 14, 2019

2019 CO 1. No. 17SC33. State v. Medved.
Conservation Easement Tax Credits—Statute of Limitations.

The Supreme Court held that the statute of limitations period within which the Colorado Department of Revenue (the Department) may invalidate a conservation easement (CE) tax credit begins when the CE donor first claims the CE tax credit.

In this case, the transferees of a portion of CE tax credit claimed the credit before the donor/transferor did. The Department later disallowed the credit in its entirety. The transferees argued that the statute of limitations period began when they claimed the credit and that the Department disallowed the credit too late. The Department asserted, in accordance with its regulation, that the period began when the donor/transferor claimed the credit and that the disallowance occurred before the period expired.

CRS § 39-22-522(7)(i) states that the CE donor shall "represent[] and bind[] the transferees with respect to . . . the statute of limitations." Based on the plain language of the statute, the Court concluded that the statute of limitations period begins only when the CE donor first claims the CE tax credit. Thus, the limitations period here had not expired when the Department disallowed the claimed credit. Accordingly, the Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with this opinion.

2019 CO 2. No. 18SA180. People v. Burnett.
Searches and Seizures—Reasonable Suspicion—Mistake of Law.

In this interlocutory appeal, the Supreme Court considered whether a Colorado State Patrol trooper made a reasonable mistake of law when the trooper stopped a car for making what he believed to be an illegal lane change after witnessing the driver flash her turn signal twice over a distance of less than 200 feet and then change lanes. The Court held that the trooper's erroneous interpretation of the governing statute, CRS § 42-4-903, did not constitute an objectively reasonable mistake of law. It is plain from the text of the statute that a driver is not required to signal continuously for any set distance before changing lanes on a highway; the statute only requires that a driver use a signal before changing lanes. Thus, because this was not a reasonable mistake of law, the trooper did not have reasonable suspicion to justify the investigatory stop. The Court therefore affirmed the trial court's suppression order.

2019 CO 3. No. 17SC297. Colorado Oil and Gas Conservation Commission v. Martinez.
Administrative Law and Procedure—Mines and Minerals.

This case required the Court to decide whether, in accordance with the Colorado Oil and Gas Conservation Act (the Act), CRS § 34-60-102(1)(a)(I), the Colorado Oil and Gas Conservation Commission (the Commission) properly declined to engage in rulemaking to consider a rule proposed by respondents.

Respondents proposed a rule that, among other things, would have precluded the Commission from issuing any permits for the drilling of an oil and gas well "unless the best available science demonstrates, and an independent,

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third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change."

After soliciting and receiving public comment and allowing interested parties to be heard, the Commission declined to engage in rulemaking to consider this proposed rule because, among other things, (1) the rule would have required the Commission to readjust the balance purportedly crafted by the General Assembly under the Act and conditioned new oil and gas drilling on a finding of no cumulative adverse impacts, both of which the Commission believed to be beyond its statutory authority, and (2) the Commission was already working with the Colorado Department of Public Health and Environment (CDPHE) to address the concerns to which the rule was directed and other Commission priorities took precedence over the proposed rulemaking at this time. The Denver District Court upheld the Commission's decision, but in a split, published decision, a division of the Court of Appeals reversed the district court's order in *Martinez v. Colorado Oil and Gas Conservation Commission*, 2017 COA 37, __ P.3d __.

The Supreme Court reversed the division's judgment and concluded that the Commission properly declined to engage in rulemaking to consider respondents' proposed rule. The Court reached this conclusion for three primary reasons. First, a court's review of an administrative agency's decision as to whether to engage in rulemaking is limited and highly deferential. Second, the Commission correctly determined that, under the applicable language of the Act, it could not properly adopt the rule proposed by respondents. Specifically, as the Commission recognized, the pertinent provisions do not allow it to condition all new oil and gas development on a finding of no cumulative adverse impacts to public health and the environment. Rather, the provisions make clear that the Commission is required (1) to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and (2) in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, but only after taking into consideration cost-effectiveness and technical feasibility. Finally, in declining to engage in rulemaking, the Commission reasonably relied on the facts that it was already working with the CDPHE to address the concerns underlying respondents' proposed rule and that other Commission priorities took precedence at this time.

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2019 CO 4. No. 17SC250. People in Interest of D.Z.B. *Standing on Appeal.*

The Supreme Court reviewed whether the Court of Appeals erred in concluding that the Arapahoe County Department of Human Services (the Department) lacked standing to challenge a district court's temporary custody order placing D.Z.B., a juvenile, in one of its residential facilities pending his delinquency adjudication.

The Court concluded that the Court of Appeals erroneously merged the analysis used to determine whether a plaintiff has standing to sue with the analysis used to determine whether a non-party has standing to appeal to assess whether the Department, a non-party to the district court proceedings, had standing to appeal. As a result, the division required the Department to demonstrate that it (1) suffered an injury in fact to a legally protected interest and (2) was substantially aggrieved by the district court's order. Because the Department was a non-party to the lower court proceedings, the Court of Appeals should have assessed only whether the Department was substantially aggrieved by the district court's order. Accordingly, the Court reversed and remanded the case to the Court of Appeals to apply the correct standard and to consider any outstanding issues.

2019 CO 5. No. 17SC139. School District No. 1 v. Denver Classroom Teachers Ass'n. *Labor and Employment—Collective Bargaining—Contract Interpretation.*

A dispute arose between a school district and a teachers' association regarding whether, pursuant to the terms of several collective bargaining agreements, the school district was required to compensate teachers for attending English Learning Acquisition (ELA) training. The trial court found the agreements ambiguous and asked the jury to interpret them. The jury, in turn, returned a verdict for the teachers' association. The school district appealed, and the Court of Appeals affirmed.

The Supreme Court affirmed the judgment of the Court of Appeals, albeit on slightly different grounds. The Court acknowledged that the agreements contain a management rights clause, which grants the school district control over all lawful rights and authority not expressly addressed in the agreements. But because the "In-Service Education" provision in the agreements is fairly susceptible to being interpreted as expressly requiring payment for ELA training, the Court cannot conclude that the management rights clause allows the school district to refuse to pay for such training. Therefore, the Court agreed with the Court of Appeals that the pertinent contract provisions are ambiguous and that their interpretation was correctly submitted as a factual issue to the jury.

January 22, 2019

2019 CO 6. No. 17SA220. Allen v. State. *Water Court Jurisdiction—"Water Matters"—Water Ownership versus Water Use.*

This case concerns whether a water court has jurisdiction to consider a claim for inverse condemnation alleging a judicial taking of shares in a mutual ditch company. The water court dismissed plaintiff-appellant's inverse condemnation claim, concluding that his claim was "grounded in ownership and the conveyance of that ownership, not use," and therefore the claim was not a water matter within the exclusive jurisdiction of the water court. The Supreme Court agreed and thus affirmed the water court's dismissal order.

2019 CO 7. No. 16SC990. People v. Wood. *Double Jeopardy—Multiplicitous Convictions—Sentencing and Punishment—Amendment and Correction.*

The Supreme Court clarified that when a mittimus provides that multiplicitous convictions merge, a defendant is afforded the protection to which he or she is entitled under the double jeopardy clause just the same as when a mittimus indicates that all but one of the multiplicitous convictions are vacated. In the double jeopardy realm, the merger of multiplicitous convictions has the same effect as vacating all but one of them.

Here, defendant's mittimus accurately documented the state district court's decision to merge his two murder convictions and impose a single life sentence on the resulting merged conviction. But, in resolving defendant's habeas corpus petition, the U.S. Court of Appeals for the Tenth Circuit misread the mittimus as containing two murder convictions for the same killing and found a double jeopardy defect. Merely because defendant's mittimus merged the multiplicitous murder convictions, rather than expressly stating that one of them was vacated, does not mean that his double jeopardy rights were violated.

Even if the Tenth Circuit correctly understood the mittimus, any error was clerical in nature. Therefore, the proper remedy was to simply correct the mittimus pursuant to Rule 36 of the Colorado Rules of Criminal Procedure.

Because a division of the Court of Appeals assumed that the Tenth Circuit's reading of the mittimus was accurate and then failed to recognize that any error in the mittimus was subject to correction under Rule 36, the Court reversed the division's judgment and vacated its opinion. However, given that the

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district court recently amended the mittimus to expressly state that one of the multiplicitous murder convictions was vacated, the Court did not remand this matter.

January 28, 2019

2019 CO 8. No. 17SC312. LeHouillier v. Gallegos. *Attorney Malpractice—Burden of Proof—Tort.*

In this attorney malpractice case founded on professional negligence, the Supreme Court was asked to decide who—the client or the attorney—bears the burden to prove that any judgment that could have been obtained against the underlying defendant would or would not have been collectible. The Court held that because the collectibility of the underlying judgment is essential to the causation and damages elements of a client's negligence claim against an attorney, the client-plaintiff bears the burden of proving that the lost judgment in the underlying case was collectible.

Here, the record shows that client-plaintiff failed to prove that the underlying judgment would have been collectible. However, given the absence of a clear statement from this Court regarding client-plaintiff's burden to prove collectibility at the time of trial, and given that the issue was not raised in this case until after client-plaintiff had presented her case-in-chief, the Court reversed the Court of Appeals' judgment and remanded the case for a new trial.

2019 CO 9. No. 16SC158. People v. Kubuugu. *Witness Qualification—Expert Testimony—Harmless Error.*

This case, which involves charges of driving under the influence and child abuse, required the Court to determine whether the trial court erred by admitting expert testimony under the guise of lay testimony and whether such error was harmless. Here, the trial court allowed a police officer to testify at trial, without being qualified as an expert, about the ability to detect the smell of metabolized alcohol and that he could, based on that odor, opine about the volume of alcohol ingested and the timing of when it was consumed. The officer testified that this ability was learned through specialized training and years of experience as a police officer.

The Court held that the police officer's testimony about the odor of metabolized alcohol was expert testimony under the guise of lay testimony because an ordinary person would be unable to offer the same opinion. Admitting this evidence was not harmless because it was the only evidence that specifically refuted defendant's testimony that he only began drinking alcohol after he had parked his car.

Accordingly, the Court of Appeals' judgment was affirmed.

2019 CO 10. No. 18SA150. People v. Barrios. *Juvenile*—Miranda—*Advisement Waiver.*

In this case, the Supreme Court considered whether a juvenile's *Miranda* advisement waiver was reliable under the totality of the circumstances. The Court held that the police detective complied with the provisions of the juvenile *Miranda* waiver statute, CRS § 19-2-511, and that the concerns identified by the trial court do not undermine the reliability of the waiver. Because both the juvenile and his legal guardian were fully advised of all the juvenile's rights and the juvenile issued a reliable waiver, his statements to police should not be suppressed. Accordingly, the trial court's order suppressing the juvenile's statements was reversed. CL

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